No. 20248

In the

United States Court of Appeals

for the Ninth Circuit

HOT OIL SERVICE, INC., a New Mexico corporation, doing business as Graves Oil Company,

Appellant,

vs.

WINIFRED BECENTI HALL, individually, and WINIFRED BECENTI HALL as Administratrix of the Estate of Joe Hall,

Appellees.

Appellant's Opening Brief

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OPENING STATEMENT

Winifred Becenti Hall was sued in the court below individually and as Administratrix of the Estate of Joe Hall. In reality, however, there is only one physical person. In order to avoid the confusion created by referring to defendant alternatively as appellee and appellees, appellant continually throughout Appellant's Opening Brief refers to defendant as "appellee". In other words, "appellee" as herein used refers to defendant both individually and as Administratrix of the Estate of Joe Hall. Where appellant has intended to refer to defendant in a single capacity, the use of "appellee" has been properly conditioned or qualified within the particular sentence or paragraph, as

for example, "appellee individually" and "appellee as administratrix".

JURISDICTIONAL STATEMENT

The jurisdiction of the District Court over the individual defendants is based on:

(1) Diversity of citizenship and amount in controversy, and is conferred by 28 U.S.C.A. § 1332.

(2) Federal question under 25 U.S.C.A. § 182 and amount in controversy, and is conferred by 28 U.S.C.A. § 1331(a).

(3) Federal question under 25 U.S.C.A. § 635 and amount in controversy, and is conferred by 28 U.S.C.A. § 1331(a).

The jurisdictional facts and statutes are pleaded in paragraphs I, II and III on pages 1 and 2 of the First Amended Complaint (Transcript of Record, pp. 55 and 56).

The jurisdiction of this Court to review the District Court's Amended Order and Judgment (1) granting appellee's Motion to Dismiss Complaint and Motion to Dismiss First Amended Complaint for want of jurisdiction, and (2) granting appellee's Motion to Dissolve Temporary Restraining Order, dismissing appellant's Complaint, dismissing appellant's First Amended Complaint, dismissing the entire action, and denying appellant's application for a preliminary injunction is conferred by 28 U.S.C.A. §§ 1291 and 1294, with respect to the dismissal for want of jurisdiction, and by 28 U.S.C.A. §§ 1292 and 1294, with respect to the denial of the preliminary injunction.

STATEMENT OF THE CASE

I. Statement of Facts

The appellee is an Indian and was a member of the Navajo Indian Tribe at the time of her marriage subsequent to

August 9, 1888 to Junior Ray Hall also known as Joe Hall. Junior Ray Hall was at the time of said marriage and thereafter, until the time of his death, a white man and a citizen of the United States and was not at any time a member of any Indian tribe.

Appellant is a corporation incorporated under the laws of the State of New Mexico and is a citizen of that State with its principal place of business at Farmington, New Mexico.

On June 5, 1964 appellant as lessee and appellee individually as lessor entered into a written lease whereby appellant leased for a period of ten years from the 1st day of July, 1964 from appellee certain property in Navajo County, Arizona, located on the Navajo Indian Reservation (See Exhibit A, Transcript of Record, pp. 65 to 70). Said lease was approved by the Tribal Council and the Advisory Committee. Appellee individually prior to entering into said lease had acquired by lease said certain property from the Navajo Indian Tribe of which appellee was a member. Appellant caused to be constructed service station facilities on the leased premises at a cost in excess of $80,000.00, which service station facilities were leased by appellant to appellee and her then-living non-Indian husband under a Service Station Lease (See Exhibit B, Transcript of Record, pp. 71 to 77). Said Service Station Lease was to and did terminate under the terms thereof on December 7, 1964. Notice of termination was sent to appellee and her then-living husband by appellant (See Exhibit C, Transcript of Record, p. 78).

Appellant re-entered the service station facilities on January 7, 1965, and padlocked the building and pumps, preliminary to reopening and operating the service station by itself or through its agents or lessees. Appellee for

reasons unknown to the appellant claims the right to remain in possession of the premises, and has threatened and made physical attempts to prevent appellant from conducting the service station business on said leased premises. On January 19, 1965, appellee obtained Letters of Special Administration in the Superior Court of the State of Arizona in and for the County of Navajo directing appellee to collect, preserve, et cetera, the assets and property of her deceased husband, including said service station (See Transcript of Record, p. 86). Appellee has no right to possession of the premises (See Transcript of Record, pp. 57-58).

Said service station premises are isolated from any community, and appellant does not have available to it any immediate protection from the threatened acts of appellee and her agents. Due to the isolated location of the premises, appellant desires to locate an employee there as soon as it is safe to do so, in order to protect the premises from vandalism and other destructive acts. Any trespasses, conflicts or altercations by appellee at the service station premises will cause irreparable and immediate injury, loss or damage to appellant, and appellant has no plain, speedy or adequate remedy at law, unless a temporary restraining order is entered by the court below (See Transcript of Record, pp. 59-60).

From time to time during the year 1964, at the special instance and request of appellee, appellant sold and delivered certain goods, wares and merchandise to appellee and appellee incurred liability for rental payments, for which there is now due and owing to appellant, the sum of $25,701.20 with interest (See Transcript of Record, Count Two, p. 61). During 1964, Graves Butane Co. of Midland, at the special instance and request of appellee, sold and

delivered goods, wares and merchandise to appellee for which there is now due and owing from appellee the sum of $765.93 with interest, said having been duly and regularly assigned to appellant (See Transcript of Record, Count Three, pp. 61-62). On November 11, 1963, defendant executed certain promissory note in writing, of which appellant is the owner and holder. Said note in the sum of $2,000.00, together with interest and attorneys' fees, is due and demand has been made (See Transcript of Record, Count Four, pp. 62-63, and Exhibit D, p. 79).

II. Procedural History of the Case

This action was commenced on January 20, 1965, in the United States District Court for the District of Arizona with the filing of a complaint seeking injunctive relief against and the recovery of money from Winifred Becenti Hall individually and as Administratrix of the Estate of Joe Hall (Transcript of Record, pp. 1-22). On January 20, 1965 the Honorable Walter E. Craig, U. S. District Court Judge, issued a Temporary Restraining Order and Order to Show Cause, fixing appellant's bond at $2,500.00 (Transcript of Record, pp. 23-25). The bond was filed and approved on January 20, 1965 (Transcript of Record, pp. 26-27). Appellee was served with summons filed February 5, 1965 (Transcript of Record, p. 30).

On February 8, 1965, appellee filed a Motion to Dismiss Complaint (Transcript of Record, pp. 35-43), and Notice of Motion to Dissolve Temporary Restraining Order (Transcript of Record, pp. 44-54). On February 10, 1965, appellant filed a First Amended Complaint (Transcript of Record, pp. 55-79). On February 12, 1965, appellee filed a Motion to Dismiss First Amended Complaint (Transcript of Record, pp. 80-87).

On February 12, 1965, argument was held before the Honorable Walter E. Craig on appellee's motions to dismiss the complaints and Motion to Dissolve Temporary Restraining Order. The matter was taken under advisement and the temporary restraining order was continued in effect with the consent of both parties.

On February 23, 1965, appellant filed Plaintiff's Memoranda in Opposition to Motion to Dissolve Temporary Restraining Order, and to Motions to Dismiss Complaints and in Support of Entry of Preliminary Injunction (Transcript of Record, pp. 88-100). On March 1, 1965, appellee filed Defendant's Memorandum in Support of its Motion to Dissolve Temporary Restraining Order, and Motion to Dismiss Complaint (Transcript of Record, pp. 101-116).

On March 23, 1965, Judge Craig entered an Order granting the motions of appellee to dismiss the complaints and appellee's Motion to Dissolve Temporary Restraining Order for want of jurisdiction, and exonerating the bond filed pursuant to the temporary restraining order (Transcript of Record, pp. 117-119). On April 21, 1965, appellant filed a Notice of Appeal (Transcript of Record, p. 120).

On April 22, 1965, Judge Craig entered an Amended Order and Judgment which amended the March 23 Order by dismissing the entire action. On April 22, 1965, appellant filed an Amended Notice of Appeal (Transcript of Record, p. 123).

SPECIFICATIONS OF ERROR

1. The District Court erred in granting appellee's Motion to Dismiss Complaint for the reasons hereinafter set forth in paragraphs 6 and 7.

2. The District Court erred in granting appellee's Motion to Dismiss First Amended Complaint for the reasons hereinafter set forth in paragraphs 6 and 7.

3. The District Court erred in granting Motion to Dissolve Temporary Restraining Order of the appellee Winifred Becenti Hall, individually, and Winifred Becenti Hall as Administratrix of the Estate of Joe Hall, Deceased, for the reasons hereinafter set forth in paragraphs 6 and 7.

4. The District Court erred in denying appellant's application for a preliminary injunction for the reasons hereinafter set forth in paragraphs 6 and 7.

5. The District Court erred in dismissing appellant's Complaint, appellant's First Amended Complaint and the entire action for the reasons hereinafter set forth in paragraphs 6 and 7.

6. The District Court erred in holding that it was without jurisdiction over the controversy in question since jurisdiction exists over the person of appellee both in her individual capacity and in her capacity as Administratrix of the Estate of Joe Hall, there being no question that she was served with process, for the following reasons:

(a) The matter in controversy is a federal question under 25 U.S.C.A. § 182, and arises under 28 U.S.C.A. § 1331(a).

(b) The matter in controversy is a federal question under 25 U.S.C.A. § 635, and arises under 28 U.S.C.A. § 1331(a).

(c) The matter in controversy is between citizens of different states, and arises under 28 U.S.C.A. § 1332.

7. The District Court further erred in holding that it was without jurisdiction over the controversy since the District Court does have jurisdiction over the subject matter of appellant's Complaint and appellant's First Amended Complaint. There is no question of comity with the State

Courts of Arizona since the subject matter is not properly within the jurisdiction of any Arizona court sitting in probate and since under Arizona law an Arizona state probate court lacks jurisdiction to determine disputed questions of title to the property allegedly of a decedent. Appellant's pleadings, which must be taken as true for purposes of appellee's motions, allege that appellant has exclusive right to the property in question and that appellee has no right to possession thereto.

ARGUMENT

We have assumed, at least in this opening brief, that the amount in controversy exceeds $10,000.00 exclusive of interest and costs as required under 28 U.S.C.A. §§ 1331 and 1332 in that it was not dealt with by the court below in its Order of March 25, 1965 (See Transcript of Record, pp. 117-119).

I. Federal Question: Rights of Indian Women Marrying White Men

The court below reasoned that it lacked jurisdiction in part because the controversy involved an Indian defendant (Transcript of Record, p. 119). However, Section 182 of Title 25, United States Code Annotated, provides as follows:

> "§ 182. Rights of Indian women marrying white men; tribal property
>
> Every Indian woman, member of any such tribe of Indians, who may be married on and after August 9, 1888, to any citizen of the United States, is declared to become by such marriage a citizen of the United States, with all the rights, privileges, and immunities of any such citizen, being a married woman: Provided, That nothing in this section contained shall impair or in any way affect the right or title of such married woman to any tribal property or any interest therein. Aug. 9, 1888, c. 818, § 2, 25 Stat. 392."

Said section begs the question: What are "all the rights, privileges, and immunities of any such citizen, being a married woman"? Certainly one of these rights is that the citizenship of the wife is that of her husband. This right will be discussed more fully with points and authorities under point III. Another of these rights is set forth in Section 1982 of Title 42, United States Code Annotated, which provides as follows:

> "§ 1982. Property rights of citizens
>
> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, *lease,* sell, hold, and convey real and personal property. R.S. § 1978." (Emphasis added.)

Appellee should be estopped from now denying that she as an Indian married to a white man does not possess the right to sub-lease the property in question under the same terms, conditions and legal consequences as white citizens.

Not one case relied on by the court below in its opinion deals either with an Indian defendant married to a white man or with Section 182 (Transcript of Record, pp. 118-119). In *Williams v. Lee,* 358 U.S. 217, 3 L. Ed. 2d 251 (1959), cited by the court below, the suit was for payment for goods sold reservation Indians by plaintiff, a non-Indian operating a store on the reservation. In the instant appeal we are concerned with an Indian married to a white man who by virtue of said marriage is guaranteed "all the rights, privileges, and immunities of any such citizen [of the United States], being a married woman." Can it be argued that such an Indian enjoys only those rights of the reservation Indians in the *Williams* case? We think not. Moreover, the *Williams* case involved the jurisdiction of the Arizona courts, not the Federal courts dealing with Federal questions.

In *Native American Church v. Navajo Tribal Council,* 272 F.2d 131 (Ct. of App. 10th Cir. 1959), cited by the court below, the Court held that the Federal court lacked jurisdiction. However, that holding must be restricted to the following language of the Court: "* * * the Federal courts are without jurisdiction over matters involving purely penal ordinances passed by the Navajo legislative body for the regulation of life on the reservation." (Supra, at 134.) In the instant appeal we are not even concerned with *any* of those elements, namely:

(1) "purely penal ordinances,"
(2) "passed by the Navajo legislative body,"
(3) "for the regulation of life on the reservation."

Furthermore, that holding only applies when *all* those elements are present. We are here concerned with leases entered into under a Federal statute (discussed more fully under point II) between white men who were not within the confines of an Indian reservation *and* an Indian woman, with the rights of any citizen of the United States married to a white man, and her white man husband. In the *Native American Church* case the church and all the parties were within the confines of the Navajo Indian Reservation. Furthermore, we are concerned with the rights of said Indian woman not only individually but also as the administratrix of her now-deceased white husband's estate.

Colliflower v. Garland, 342 F.2d 369 (Ct. of App. 9th Cir. 1965), cited by the court below, does not support that court's dismissal of appellant's case for lack of jurisdiction. In that case the Court took jurisdiction in a habeas corpus proceeding and inquired into the legality of the detention of an Indian pursuant to an order of an Indian court. The Court held:

> "In spite of the theory that for some purposes an Indian tribe is an independent sovereignty, we think that, in the light of their history, it is pure fiction to say that the Indian courts functioning in the Fort Belknap Indian community are not in part, at least, arms of the federal government. Originally they were created by the federal executive and imposed upon the Indian community, and to this day the federal government still maintains a partial control over them. In Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res., supra, the court held that comparable Indian courts 'have been authorized by federal legislative action' (231 F.2d at 94) and that 'federal legislative action and rules promulgated thereunder support the authority of the Tribal Courts'. (Id. at 96)
>
> "[8] Under these circumstances, we think that these courts function in part as a federal agency and in part as a tribal agency, and that consequently it is competent for a federal court in a habeas corpus proceeding to inquire into the legality of the detention of an Indian pursuant to an order of an Indian court." (Supra, at 378-379.)

Moreover, regardless of how the court below determined in what manner the *Colliflower* case supported its own action, that case must be limited to its facts. As the Court in *Colliflower* itself stated:

> "We confine our decision to the courts of the Fort Belknap reservation. The history of other Indian courts may call for a different ruling, a question which is not before us." (Supra, at 379.)

In *Hatch v. Ferguson,* 57 Fed. 959 (D. Wash. 1893), decided shortly after the enactment of Section 182, the Court discussed the nature of the rights, privileges and immunities of an Indian woman married to a white man. In discussing diversity the Court in *Hatch* said:

> "* * * the evidence shows that upon her marriage she voluntarily took a residence apart from the tribe to which she belonged, and adopted the habits of civilized life, by reason of which fact and her marriage to a citizen she is entitled to the same rights as other female citizens. * * * Being a citizen of the United States and a resident of the state of Oregon at the time of the commencement of this suit, she is also a citizen of the state of Oregon, and entitled to prosecute this suit in this court against the defendants, who are citizens of the State of Washington."

In other words, the Court concluded that such a woman could maintain a suit in the Federal courts against citizens of other states. Appellant maintains that the converse of this must be true or the principle laid down in the *Hatch* case itself cannot stand.

Appellant maintains that any action arising under Section 182 is an action arising under the laws of the United States and that the district courts should have original jurisdiction as provided under 28 U.S.C.A. § 1331(a).

II. Federal Question: Lease of Navajo Tribe Lands

Section 635 of Title 25, United States Code Annotated, provides for the leasing of restricted Navajo Tribe lands and lands held in fee simple by the Navajo Tribe. Under this Section land may be leased by the Tribe or by members thereof.

The land which is the subject of this appeal was leased to appellee individually by the Navajo Tribal Council, and was in turn subleased to appellant with the written approval of the Tribal Council and Advisory Committee. Said land is within the purview of Section 635, and said leases were entered into pursuant to Section 635.

Not one case relied on by the court below in its opinion deals with a lease or sublease entered into pursuant to Section 635, or any other Federal statute. Nonetheless, the court below reasoned:

> "* * * this Court is without jurisdiction over a controversy arising out of a lease and sublease of restricted Indian land within the confines of the Navajo Indian Reservation * * *."

The very reasoning which led the court below to conclude that it did not have jurisdiction should have led it to conclude that it did have jurisdiction. 28 U.S.C.A. § 1331(a) clearly provides that in any action arising under the laws of the United States, the district courts shall have original jurisdiction if the jurisdictional amount is present.

As the Court stated in *Brown v. Stufflebean,* 187 F.2d 347, 349 (Ct. App. 10th Cir. 1951):

> "The trial court [District Court of the Eastern District of Oklahoma] sustained its jurisdiction over the suit as one arising out of the laws of the United States and involving the requisite amount in controversy.
>
> "While the object of the suit is to cancel or nullify deeds of conveyance, *it has its genesis in the Act of Congress relating to the alienability of Indian Lands.* [25 U.S.C.A. § 355.] The right asserted is a federally created right, and a federal statute is invoked as a basis for the relief sought. The court therefore had jurisdiction over the subject matter and the parties. See Board of County Commissioners of Creek County v. Seber, 10 Cir., 130 F.2d 663, affirmed 318 U.S. 705, 635 Ct. 920, 87 L.Ed. 1094; Shelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 705 Ct. 876, 94 L.Ed. 1194." (Emphasis added.)

Appellant's suit is to enforce certain lease agreements and *has its genesis in an Act of Congress relating to the*

alienability of Indian Lands, 25 U.S.C.A. § 635. As in the *Brown* case, this very fact gave the court below jurisdiction.

III. Diversity of Citizenship

As stated under point I, one of the rights of a married woman is that the citizenship of the wife is that of her husband. In the case of *Seideman v. Hamilton,* 173 F.Supp. 641 (E.D. Penn. 1959) (affirmed 275 F.2d 224, cert. den. 4 L.Ed.2d 1517), plaintiff, a Pennsylvania citizen, was suing defendant for injuries sustained as a result of a collision with defendant's automobile in Delaware. Defendant had lived in Pennsylvania prior to the death of her husband. After his death she continued to maintain the Pennsylvania home although she traveled extensively and visited with her parents in Delaware from time to time. Defendant moved to dismiss for lack of diversity jurisdiction, 28 U.S.C.A. § 1332. The Court in granting defendant's motion held: "In the instant case, defendant's marriage conferred upon her the citizenship of her husband." (Supra, at 643.) The Court went on to say that there was no showing of any intent to or physical change of domicile by the defendant.

In *Prince v. New York Life Ins. Co.,* 24 F.Supp. 41 (D. Mass. 1938), plaintiff, a married woman, was suing individually and as an administratrix. The Court held:

> "These actions, removed from the State court, are before this court on plaintiff's motions to remand. Plaintiff contend that this court is without jurisdiction inasmuch as there is no diversity of citizenship. In one case, plaintiff sues in her capacity as administratrix, but since, in such an action, the citizenship of the administratrix controls (Mecom v. Fitzsimmons Co., 284 U.S. 183, 52 S.Ct. 84, 76 L. Ed. 233, 77 A.L.R. 904), the same issue is presented in both cases. That issue is

whether on September 9, 1936, when the actions were commenced, the plantiff was a citizen of New York State. If so, there was no diversity of citizenship.

[2] Plaintiff is a married woman, and her citizenship is that of her husband." (Supra, at 41.)

Appellant contends that inasmuch as appellee's husband was a domicilliary of Arizona and inasmuch as there has been no showing that appellee intended to or did in fact change her domicile, at the time of the filing of this suit appellee as a married woman possessed the citizenship of her husband, which was Arizona citizenship. Therefore, since appellant is a New Mexico corporation the proper diversity exists to give the court below jurisdiction under 28 U.S.C.A. § 1332.

Moreover, since appellee was appointed administratrix over her deceased husband's estate by the Superior Court of the State of Arizona sitting as a Probate Court it must be that appellee was competent to so be appointed. Arizona Revised Statute § 14-418 in part provides:

"§ 14-418. Persons not competent to be administrator

"A person is not competent to serve or to be appointed as administrator who is:

* * * * * * * *

"3. Not a bona fide resident of this state and a citizen of the United States, except in ancillary probate."

In other words, by requesting appointment and being so appointed appellee has in fact admitted that she is "a bona resident" of Arizona, and not a resident of the Navajo Indian Reservation. Since it has not been shown by appellee that she has a domicile elsewhere, appellant main-

tains that appellee's state of bona fide residence, namely Arizona, must be presumed to be her state of domicile.

It seems incongruous that appellee could be a resident of Arizona under A.R.S. § 14-418, that appellee's husband could be a citizen of Arizona, and that appellee, without showing a domicile separate and apart from that of her husband, could be a citizen of any place but Arizona. Again it is urged by appellant that appellee in marrying a white man took his citizenship. Furthermore, such a grant under 25 U.S.C.A. § 182 is based on the act of marriage and there is nothing contained in the statute which expressly or impliedly retracts this grant on the death of the husband. To hold otherwise, would be to give Indian women married to white men a status different from that accorded other women married to white men which is clearly not the intent of Section 182.

Furthermore, appellee in submitting herself to the jurisdiction of the Superior Court of the State of Arizona sitting as a Probate Court has disavowed any protected status she might formerly have had as an Indian and should be estopped from now using her race as a sword to thwart justice. If this is not so, white men would be wise to have Indians appointed in State courts as their executors, trustees, guardians, et cetera since such would prevent any suits by adverse parties in the Federal courts. It is inconceivable that this is the intended result of the privileged position enjoyed by Indians, particularly in light of 25 U.S.C.A. § 182.

Appellant would further point out that Defendant's Memorandum in Support of its Motion to Dissolve Temporary Restraining Order, and Motion to Dismiss Complaint concedes that appellee is a citizen of the State of Arizona (See Transcript of Record, p. 101).

IV. Lack of Jurisdiction of Superior Court of the State of Arizona Sitting as a Probate Court

Undoubtedly the court below was influenced in its decision by the fact that appellee was appointed administratrix by the Superior Court of the State of Arizona sitting as a Probate Court and by the fact that decedent's estate was being probated before that court. Although these issues are not specifically dealt with in that court's March 23, 1965 Order (Transcript of Record, pp. 117-118), they were raised and argued by both appellant and appellee in their pleadings.

Appellant maintains that the Superior Court of the State of Arizona sitting as a Probate Court lacks the necessary jurisdiction to determine title to these lands, that is, the Superior Court of the State of Arizona sitting as a Probate Court lacks jurisdiction to determine whether or not appellee and the Navajo Indian Tribe could alienate the title to these lands by leases under 25 U.S.C.A. § 635.

There is considerable authority for the proposition that a court sitting as a probate court lacks jurisdiction to determine disputed titles to the property of the estate of a decedent. A general statement of the rule is contained in Bancroft's Probate Practice (2nd Edition) § 27 as follows:

> "It is thoroughly established that in probate proceedings title to property as between the estate, the heirs or devisees, and a third person may not be tried. Thus a superior court, sitting in probate, has no jurisdiction or authority to determine disputed titles to the property of the estate of a deceased person. The rule extends to disputes as to the ownership of personalty as well as to title to realty. It is broad enough to preclude the assumption of jurisdiction of any dispute which exists between the heirs or representatives and third persons where the controversy is not incidentally

involved in the clear exercise of the court's probate functions."

The rule set forth above has been recognized in Arizona as indicated by *Horne v. Blakeley,* 274 P. 173, 174 (Ariz. 1929). There the Court said:

> "It is unquestionably the rule of law in this state that the superior court, in the exercise of probate jurisdiction, has no jurisdiction whatever to try or to determine a claim of title to property, listed as part of the estate, made by a stranger thereto. The precise question has been before us in the case of Estate of Tamer, 20 Ariz. 232, 179 P. 644. Therein we stated:
>
> > " 'Aside from that, we are unable to find any law in our statutes authorizing the superior court, while exercising probate jurisdiction, to entertain a petition from a stranger asking that certain of the assets of the estate of the deceased person be turned over to her, and certainly there is no authority in law empowering the superior court, while acting in matters of probate, to make the order we are considering. If part of the inventoried and appraised assets of an estate of a deceased person is claimed by a stranger or third person as his, the jurisdiction to try and determine his rights is not in the probate court, but in the superior court exercising law and equity powers. * * * That the superior court, acting in a probate matter, was without power or jurisdiction to enter the judgment appealed from, there seems no doubt.' "

This rule was reiterated by the Arizona Supreme Court in *Fernandez v. Garza,* 320 P.2d 948, 949-950 (Ariz. 1958) as follows:

> "She is not claiming to be an heir or a creditor of the estate but as a stranger she claims ownership of part of the property which the administratrix has represent-

ed as the property belonging to the estate. The probate court can do nothing effectively concerning such a claim. A dispute of this nature cannot be decided by the probate court. Its judgment in that respect is a complete nullity for lack of jurisdiction. Horne v. Blakely, 35 Ariz. 39, 274 P. 173. If in fact some of appellee's property is embodied in the decree of distribution, to that extent it is a nullity, Jent v. Brown, Okl., 280 P.2d 1005, and through the appropriate remedy in a court of general jurisdiction proper relief may be had."

Since the Superior Court of the State of Arizona sitting as a Probate Court could not have determined the title of the alleged decedent to the property in question when the same was claimed adversely by appellant and since for the purposes of appellee's motions to dismiss it must be assumed that appellee's right to possession of the subject property both individually and as the administratrix of her husband's estate had terminated, the court below by entering the Temporary Restraining Order did not interfere with the valid exercise of jurisdiction of the State Court and it will not interfere with such jurisdiction by entering a preliminary injunction against appellee in her two capacities.

CONCLUSION

This Court should reverse the District Court's Amended Order and Judgment which (1) granted appellee's Motion to Dismiss Complaint and Motion to Dismiss First Complaint for want of jurisdiction, and (2) granted appellee's Motion to Dissolve Temporary Restraining Order, dismissing appellant's Complaint, dismissing appellant's First Amended Complaint, dismissing the entire action, and deny-

ing appellant's application for a preliminary injunction. This Court should find that the District Court in fact has jurisdiction under 28 U.S.C.A. § 1331(a) and/or under 28 U.S.C.A. § 1332, as urged by appellant.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing brief is in full compliance with those rules.

EARL H. CARROLL

CERTIFICATE OF SERVICE

This is to certify that service of this brief was had upon appellee in the following manner: three copies of said brief were served upon Winifred Becenti Hall, individually and as Administratrix of the Estate of Joe Hall, by depositing said copies in the United States mails, postage prepaid directed to Winifred Becenti Hall, Kayenta, Arizona, on the 25th day of August, 1965.

EARL H. CARROLL